Filed 8/3/09 P. v. Ensey CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM LEON ENSEY,

Defendant and Appellant.

F055431

(Super. Ct. No. CRF25795)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Chuck A. French and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant William Leon Ensey entered a casino with a counterfeit travelers check in the amount of $500, attempted to cash it and was arrested. The travelers check was one of eight that had mysteriously arrived in the mail to Rayanne Hawkins (Rayanne), the daughter of appellant's girlfriend, Traci Hawkins (Traci). Appellant was given one of the eight checks and he proceeded directly to the casino with Traci and a friend, Rickey Jones (Jones). At trial, appellant testified he did not know that the travelers check was a forgery. The jury disagreed and found appellant guilty as charged of second degree burglary (Pen. Code,[1] § 459) and possession of a forged check with intent to defraud (§ 475, subd. (a)). Appellant appeals from his conviction on the following three grounds: (1) the evidence that Rayanne and her sister, Sarah Van Winkle (Sarah), knew the travelers checks were counterfeit should have been excluded pursuant to Evidence Code section 352; (2) the jury was not correctly instructed on the specific intent element of burglary; and (3) appellant's presentence credits were miscalculated. Although we modify the judgment to correct the amount of presentence credits, in all other respects we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

The Parties and Relationships

Appellant was the longtime boyfriend of Traci and thought of Traci as his wife. Traci's two daughters, Rayanne and Sarah, considered appellant to be their stepfather. Jones was appellant's friend and an acquaintance of the other family members. Appellant, Traci and Jones were arrested based on the events at the casino (described more fully hereafter) and were codefendants in the trial below.

The Travelers Checks

In early December of 2007, Rayanne received an unmarked envelope in the mail with no return address and no cover letter inside. The envelope contained eight

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1 Unless otherwise indicated, all further statutory references are to the Penal Code.

counterfeit $500 American Express Travelers Cheques (travelers checks) made out to Rayanne. Rayanne had "no idea" who sent her the checks. Although she was "a little bit" suspicious, she thought the checks could possibly be related to her home-based online business. However, she admitted that she had never before received such a large sum, and that payments had never been in the form of travelers checks or in even denominations. Rayanne gave at least three of the checks to her mother, Traci, which gift was intended for appellant's benefit as well. She also gave one check to her sister, Sarah. Rayanne placed the checks in her grandmother's bedroom in an envelope.

On December 7, 2007, Rayanne attempted to cash one of the travelers checks at Money Mart, a check cashing store. The cashier at Money Mart, Zayra Murillo, became suspicious when she noticed that the travelers check had smeared ink and the color of the check did not look right. She telephoned American Express and verified that the travelers check was counterfeit. Murillo asked Rayanne where she got the check and Rayanne said she obtained it from a local bank. Murillo informed Rayanne that the check was counterfeit and that if she tried to cash it again, she could be arrested. At that point, Rayanne became nervous and said she actually received it from her daughter. Murillo recorded the check in the store computer and marked it so that any Money Mart cashier would easily recognize it as counterfeit, and then returned the check to Rayanne. Rayanne put the rejected check in the envelope in her grandmother's bedroom with the three checks she had given to her mother. Rayanne testified that she did not tell anyone about the check being rejected.

The Attempt to Cash the Travelers Checks

On the evening of December 12, 2007, Traci retrieved from her mother's bedroom the three travelers checks she had been given earlier. Appellant and Jones were each given a travelers check and, later that same night, appellant, Traci and Jones went to the Black Oak Casino to gamble. They brought the travelers checks with them. All three were aware that Rayanne had received the checks in the mail in an unmarked envelope

with no return address, letter or other explanation. They arrived at the casino at about 10:00 p.m.

Shortly after midnight, which was the early morning of December 13, 2007, appellant approached the casino's cashier window and tried to cash one of the travelers checks. The cashier, Lisa Huckabee, did not cash the travelers check because it was not made payable to the casino but to some other person who was not present (i.e., Rayanne). Huckabee confirmed with her supervisor that the check was not acceptable, returned to the cashier's window and gave the check back to appellant. She explained to him why the casino could not accept it. Appellant took the check and walked away.

A few minutes later, but before he learned that appellant's check had been rejected by the casino, Jones approached a different cashier and attempted to cash one of the travelers checks. The cashier, Melissa McDaniel, looked at the travelers check and realized that it was counterfeit. Among other things, she noticed that the word "Travelers" was misspelled twice but elsewhere spelled correctly, and there was no watermark or magnetic security strip. Additionally, the travelers check stated on its face that the acceptance procedure was printed on the reverse side, but nothing was printed on the back of the check. Casino security was contacted, and security personnel verified with American Express that the check was not valid and then contacted the sheriff.

Sheriff's Deputy Brandon Lowry arrived on the scene and separately interviewed appellant, Traci and Jones. Casino safety officer Eli Wingo was present during portions of the interviews. When Traci was asked if she was suspicious that the travelers checks might have been counterfeit, she responded that "'at first she was, but 500 bucks is 500 bucks.'" All three suspects acknowledged the checks originally came from Rayanne, and they knew that Rayanne had received them in the mail in an unmarked envelope, but all three denied any knowledge that the checks were counterfeit.

On December 13, 2007, Sheriff's Detective Eric Erhardt went to the residence of appellant and Traci in Modesto to look for any type of computers or printers along with

any additional travelers checks. When he arrived, Sarah was present at the residence. Detective Erhardt asked her if she had any of the travelers checks in her possession. Sarah admitted that she had two checks in her purse and he removed the two checks. Detective Erhardt asked her if she had attempted to cash any of the checks and she responded that she had not done so because "she didn't believe that they were real." Sarah also told Detective Erhardt that she knew her sister, Rayanne, had attempted to cash one of the checks at the Money Mart and the check had been rejected.

Appellant, Traci and Jones each testified on their own behalf at trial. Appellant testified that Traci handed him one of the checks on the same night they went to the casino. He was aware that the checks came from Rayanne, who had received them in the mail in an unmarked envelope. He explained that he attempted to cash the travelers check when his other gambling money ran out. He testified he had no idea that the check was counterfeit.

Jones testified that he had no knowledge the travelers check given to him by Traci was counterfeit. He said he did not know anything about travelers checks, had never seen one before, and was nearly illiterate and not knowledgeable of such things. He said Traci gave it to him as a gift because he had helped out with repairs in the past, and he did not have any reason to believe the check was not valid. A character witness testified on Jones's behalf, indicating that although Jones was illiterate, gullible and naïve, he was an honest man.

Traci testified that she received the checks from Rayanne, knowing that Rayanne had gotten them in the mail in an unmarked envelope, but that she (Traci) had no idea they were counterfeit.

Verdict and Sentence

On May 9, 2008, the jury found appellant and Traci guilty as charged on both counts, which were for second degree burglary (a violation of § 459) and possession of a forged check with the intent to defraud (a violation of § 475, subd. (a)). Although Traci

did not personally attempt to cash one of the checks, she was found to be an aider and abettor in appellant's criminal conduct. The jury deadlocked on both counts as to Jones and a mistrial was declared as to him.

Appellant was sentenced on June 4, 2008, to a total prison term of 11 years, which term was arrived at by application of the "Three Strikes" law and the imposition of further enhancements based on his five prior prison terms. The trial court limited appellant's presentence credits to 20 percent of his actual time served in custody. Appellant's appeal followed.

DISCUSSION

I. The Admission of Evidence of Others' Knowledge That Travelers Checks Were Counterfeit Was Not a Prejudicial Abuse of Discretion

Appellant objected in the trial court to the admission of certain evidence reflecting that Sarah and Rayanne had prior knowledge that the travelers checks were counterfeit. Appellant argued that since there was no evidence that Sarah or Rayanne ever relayed such information to anyone else, the probative value of such evidence was outweighed by its prejudicial effect pursuant to Evidence Code section 352. The trial court overruled the objection. As a result, the jury heard the testimony of Detective Erhardt that when he interviewed Sarah, she told him that she had not attempted to cash the travelers checks because she did not believe they were real. The jury also heard the testimony of Money Mart cashier, Zayra Murillo, that on December 7, 2007, Rayanne attempted to cash one of the checks and was told in no uncertain terms that it was counterfeit. On appeal, appellant contends the admission of such evidence was prejudicial error that deprived him of a fair trial. We disagree.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will … create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In the weighing process contemplated by this statute, it is

appropriate for the trial court to consider such factors as the nature, relevance and remoteness of the proffered evidence, the likelihood that such evidence may confuse, mislead or distract the jurors from their main inquiry, and its likely prejudicial impact. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 [considering issue of evidence of prior sexual offenses].)

"A trial court is vested with wide discretion in deciding the relevancy of evidence. [Citations.] Further, it is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. [Citation.] On appeal, the court's exercise of such discretion will not be disturbed absent a clear showing of abuse." (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) "We review a challenge to a trial court's choice to admit or exclude evidence under [Evidence Code] section 352 for abuse of discretion. [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.) We will reverse only if the court's ruling was arbitrary, whimsical, or capricious as a matter of law, or falls outside the bounds of reason. (*Ibid.*; *People v. Wesson* (2006) 138 Cal.App.4th 959, 969.) Moreover, to be reversible, an erroneous admission of evidence must have resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 353; *People v. Harris* (1998) 60 Cal.App.4th 727, 741.)

"It is important to keep in mind what the concept of 'undue prejudice' means in the context of [Evidence Code] section 352. 'Prejudice' as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant." (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 286.) "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side

because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.) "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

We reject appellant's contention that the probative value of the evidence was outweighed by its prejudicial effect. To begin with, the evidence was of relevance, at least circumstantially, regarding the central issue in the case of whether or not appellant (and his codefendants Traci and Jones) had actual knowledge of the fraudulent nature of the travelers checks. (See *People v. Jones* (1998) 17 Cal.4th 279, 325 [relevant evidence is that which has "'any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action'"].)[2] If Rayanne knew on December 7, 2007, that the checks she had given to family or friends were counterfeit and that anyone attempting to cash them would be at risk of arrest, the jury could reasonably infer in the context of her relationships to the other parties (i.e., her mother, stepfather and a friend) that she would likely have shared that vital information with them. Likewise, the evidence that Sarah did not believe the checks were real was of some evidentiary value, even if fairly minimal, to the extent that it would permit an inference that even an untrained person could tell that the checks appeared to be suspect. The jury, of course, would be able to evaluate for themselves, firsthand, whether the checks were obviously fraudulent, but arguably Sarah's testimony still had some minor evidentiary value as one factor or circumstance bearing on that question.

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[2] Of course, "[e]xcept as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.)

Moreover, appellant has failed to demonstrate that such evidence had an undue prejudicial effect within the meaning of Evidence Code section 352. On the record before us, there is no basis for concluding that the particular testimony in question evoked an emotional bias against appellant as an individual, inflamed the jury against appellant, or otherwise distracted the jury from its main responsibility of fairly evaluating and assessing all of the evidence in the case. We conclude the trial court did not abuse its discretion in admitting the above evidence.

But even assuming, *arguendo*, that the trial court should have excluded this evidence, appellant suffered no prejudice. The travelers checks were shown to the jurors and they were fully capable of deciding for themselves whether an untrained person (such as appellant) would have been able to easily identify them as fraudulent. There was also overwhelming evidence that the checks had smeared ink, misspelled the word "travelers," had no watermark or security strip, and had no instructions on the back despite the clear notification on the front that the acceptance procedure was printed on the reverse side. Additionally, appellant (along with Traci and Jones) admitted that he knew the checks arrived without explanation in an unmarked envelope with no return address. In light of these facts, any error in admitting the subject testimony was clearly harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[3]

II. The Trial Court Did Not Err in its Instruction to the Jury on the Specific Intent Element of Burglary

Appellant next contends the trial court prejudicially erred in its jury instruction on the specific intent element for second degree burglary. We now consider that issue.

The trial court instructed the jury, in relevant part, as follows: "The defendants are charged in Count I with burglary, violation of section 459 [] of the [P]enal [C]ode. To

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3 For the same reasons, we reject appellant's claim that admission of such evidence was so prejudicial as to render his trial "fundamentally unfair" in violation of due process. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913.)

prove that the defendants are guilty of this crime, the People must prove, one, the defendant entered a building, and when he or she entered the building, he or she intended to commit the crime of passing or attempting to pass a counterfeit document." The jury was also told that entering the building with that specific intent would complete the crime of burglary in this case: "A burglary is committed if a defendant entered with the intent to commit the crime of passing or attempting to pass a counterfeit document. The defendant does not need to have actually committed that crime if he or she entered with the intent to do so."

As the instructions correctly reflect, for purposes of the crime of burglary it is sufficient if the perpetrator *intended* to commit a theft or felony at the time he or she entered the premises; the targeted crime need not be actually carried out. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042; *People v. Gbadebo-Soda* (1995) 38 Cal.App.4th 160, 166; § 459.) The particular instructions in this case were given in light of the evidence that appellant may have entered the casino with the intent to commit the target crime of forgery. Forgery is defined in the Penal Code to include not only *passing* a counterfeit check with intent to defraud, but also *attempting* to pass a counterfeit check with intent to defraud. (See §§ 476 & 470, subd. (d).) With regard to appellant's purported target offense of forgery, the jury was instructed by the trial court on the "inten[t] to defraud" element of that crime as well as on the fact that forgery includes not only passing or using a counterfeit check, but also attempting to do so with such a fraudulent intent.

Appellant contends the trial court committed prejudicial error when it told the jury that the specific intent element for purposes of the burglary count would be satisfied if appellant "entered with the intent to commit the crime of passing *or attempting* to pass a counterfeit document" (italics added). The gist of appellant's logic runs as follows: If appellant intended only to *attempt* to commit an offense when he entered the casino, he must not have intended to actually commit that offense since an attempt by its very nature

is an uncompleted target crime, and therefore the specific intent requirement for burglary would be lacking. That is, he asserts "there can be no burglary with the underlying intent of committing an *attempted* offense." We reject appellant's argument.

"When evaluating jury instructions, we follow familiar rules. 'Jury instructions must be read together and understood in context as presented to the jury. Whether a jury has been correctly instructed depends upon the entire charge of the court. [Citations.]' [Citation.] Jurors are presumed to be intelligent persons capable of understanding and correlating jury instructions. [Citation.] An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury. [Citations.]" (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1277.)

Here, we have no difficulty concluding there was no instructional error; and even if there was a lack of precision in the instructions, the jury was not misled. As noted, the Penal Code defines forgery to include both the act of passing a fraudulent check as well as the act of *attempting* to pass such a check with the intent to defraud. (See §§ 476 & 470, subd. (d).) Success in passing a counterfeit check is not essential to the crime of forgery; the crime is committed (or completed) even by the attempt to do so. (See *People v. Williams* (1960) 186 Cal.App.2d 420, 425; *People v. Fork* (1965) 233 Cal.App.2d 725, 731.)[4] That is the gist of what the trial court was conveying in its instructions to the jury.

In this context, we believe the jury likely correlated the *attempt* language in the jury instructions to the fact that the crime of forgery (the target offense for purposes of the burglary count) may be committed by even an attempt to pass a counterfeit document. Indeed, the evidence presented to the jury clearly showed that appellant entered the casino with the travelers check in his possession and proceeded to attempt to cash it, but

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[4] An attempt occurs when a defendant specifically intends to commit the crime but his or her steps taken to further that intent are ineffectual or unsuccessful. (§ 21a; *People v. Medina* (2007) 41 Cal.4th 685, 694.)

his effort to do so was unsuccessful. Thus, the jury was properly informed that even appellant's unsuccessful *attempt* to cash the check could constitute the crime of forgery.

Moreover, the particular wording used by the trial court to describe the specific intent element of the burglary count (i.e., an intent "to commit the crime of passing or attempting to pass a counterfeit document") was reasonably clear and the jury would not have taken it to mean the opposite of what it says (i.e., that appellant did not intend to actually commit such crime or crimes). Jurors are presumed to be intelligent persons with a measure of common sense. If, at the time of his entry into the casino premises, appellant intended to try and defraud the casino by a plan to cash the counterfeit travelers check, it is absurd to suggest that he, at that same time, intended *not* to cash the counterfeit travelers check. Similarly, we do not believe the jury could reasonably have understood the instructions to mean that appellant somehow intended to *attempt*, but not actually to *commit*, the crime of passing a counterfeit check. No reasonable jury would conclude from the instructions given that the specific intent described therein was an intention to deliberately fail or fall short of the desired goal of cashing the fraudulent check.

We note that under the preliminary provisions and general definitions of section 21a, an attempt to commit a crime is said to consist of (1) a specific intent to commit the crime, and (2) a direct but ineffectual act done toward its commission. In more ordinary parlance, to attempt something means "[t]o try to do, make, or achieve." (Webster's II New College Dict. (1995 ed.) p. 72.) Clearly, what the statutory definition and the ordinary meaning of the word have in common is the idea that the person involved seeks to actually accomplish the thing he or she is attempting to do, which is the object of his or her intention, and we have no reason to believe the jury understood the term in any other way here.

Appellant relies on *People v. Iniguez* (2002) 96 Cal.App.4th 75 (*Iniguez*), which held that a conspiracy to commit an attempted murder is not a crime:

> "The conduct defendant pleaded to, conspiracy to commit attempted murder, is a conclusive legal falsehood. This is because the crime of attempted murder requires specific intent to actually commit the murder, while the agreement underlying the conspiracy pleaded to contemplated no more than an ineffectual act. No one can simultaneously intend to do and not do the same act, here the actual commission of a murder. Defendant has pleaded to a nonexistent offense." (*Iniguez, supra,* 96 Cal.App.4th at p. 79, fn. omitted.)

Appellant likens the instant case to that of *Iniguez* because of the trial court's instruction that appellant committed burglary if he entered the casino with intent "to commit the crime of passing or attempting to pass a counterfeit document." Appellant claims the instruction allowed the jury to convict him based on *intent to commit an attempt*, which he argues is a legal falsehood under the reasoning of *Iniguez*.

We find the present case to be distinguishable from the situation in *Iniguez* for two important reasons and thus its holding is not applicable here. First, as explained at length above, the jury instructions here were reasonably clear under all of the circumstances and did not mislead the jury in regard to special intent needed for burglary in this case. Second, the target crime in the present case differs significantly from the unique conspiracy context of *Iniguez*. An attempt to intentionally pass a counterfeit check constitutes the *completed* crime of forgery. (§ 476.) In contrast, the conduct pled to by the defendant in *Iniguez* (i.e., a conspiracy to commit an attempted murder) was not itself a crime. Thus, here, we do not have the situation where the intent involved was potentially to commit an act that was not itself criminal. For these reasons, we reject appellant's contention that *Iniguez* is applicable or that it mandates reversal of the burglary conviction.

In conclusion, we hold the jury was adequately instructed regarding the special intent requirements for purposes of the burglary count against appellant.

III. The Trial Court Erred in Calculating Custody Credits

Appellant contends that the trial court improperly limited his pretrial custody credits to 20 percent of his actual presentence time served and that he was actually

entitled to 50 percent credit pursuant to section 4019. Respondent rightly concedes the error.

At the time of sentencing, the trial court calculated that appellant had served 168 actual days in custody and granted appellant 33 days of presentence credits, apparently based on the assumption that appellant was entitled to 20 percent of the number of actual days served pursuant to section 1170.12, subdivision (a)(5). However, the limitation of section 1170.12, subdivision (a)(5), was not applicable because that section addresses *postsentence* conduct credits. (*People v. Thomas* (1999) 21 Cal.4th 1122, 1125-1127.) Instead, appellant was entitled to presentence credits based on section 4019, using the formula of crediting appellant with two days of conduct credit for every unit of four days he actually served. (*People v. Madison* (1993) 17 Cal.App.4th 783, 786-787.) Based on the correct formula, we agree with appellant that he is entitled to 84 days of presentence credits.

DISPOSITION

The judgment is affirmed with directions to the superior court clerk to (1) prepare and file an amended abstract of judgment reflecting that appellant served 168 actual days in presentence custody and is entitled to an additional 84 days of presentence conduct credits, for a total of 252 days, and (2) forward a copy of the amended abstract of judgment to counsel and to the prison authorities.

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Kane, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Wiseman, J.